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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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No. 113

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THE ENOCH PRATT FREE LIBRARY OF BALTI-  
MORE CITY, THOMAS S. CULLEN, ET AL.,  
*Petitioners,*

*vs.*

T. HENDERSON KERR AND LOUISE KERR,  
*Respondents*

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BRIEF IN OPPOSITION TO THE PETITION FOR  
WRIT OF CERTIORARI AND SUPPORTING BRIEF

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**BRIEF IN OPPOSITION TO THE PETITION FOR  
WRIT OF CERTIORARI AND SUPPORTING BRIEF**

---

Respondents oppose the granting of a writ of certiorari in this case on the ground that the decision of the United States Circuit Court of Appeals, Fourth Circuit (R. 221 et seq.) is clearly right, and that the main reasons advanced by petitioners for issuance of the writ concern collateral matters not necessarily involved in the decision of this case.

**Opinions Below**

The opinion of the Circuit Court of Appeals filed April 17, 1945 is printed in 149 F. 2d 212, and appears in the record at p. 221. The opinion of the District Court is printed in 54 F. Supp. 514, and appears in the record at p. 24.



### Basis of Jurisdiction

Jurisdiction is invoked under Section 240-a of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. Sec. 347-a); the United States Constitution, XIV Amendment, Sec. 1; Federal Civil Rights Law, 8 U. S. C. Secs. 41 and 43; the Declaratory Judgments Act, 28 U. S. C. Sec. 400.

### Question Presented

Is the Enoch Pratt Free Library of Baltimore City, a corporation created by the Maryland legislature with a self-perpetuating board of trustees for the purpose of operating *a free public library for the people of Baltimore, on public property and with public funds derived mainly from public taxation*, subject to the restraints of the XIV Amendment of the United States Constitution, to the extent it cannot exclude solely because of race or color a qualified Negro applicant from an intramural library training class conducted *on public property with public funds* for the purpose of training a reserve of library assistants for its own system where said library training class is the only library training class within the State?

### Legislation Involved

1. *Federal*: United States Constitution, XIV Amendment, Section 1; the Civil Rights Act, 8 U. S. C., Secs. 41 and 43; the Declaratory Judgments Act, 28 U. S. C. Sec. 400.

2. *Maryland*: Declaration of Rights, Act 43; Constitution, Art. 3, Sec. 48; Acts 1882, c. 181; 1908, c. 144; 1927, c. 328; 1939, c. 16.

3. *Baltimore City*: Ordinance 106, July 18, 1882; Ord. 64, May 14, 1883; Ord. 145, Oct. 10, 1884; Ord. 215, May 11,

1907; Ord. 249, April 23, 1920; Ord. 1053, April 13, 1927; Ord. 559, Dec. 7, 1928; Ord. 1195, Dec. 16, 1930; Ord. 961, May 24, 1939; Baltimore City Charter, Sec. 6-14a.

The pertinent parts of the legislation are quoted in the Statement of Facts or appear elsewhere in the Records and Briefs as cited.

### **Statement of the Case**

#### *The Beginning of the Library*

January 21, 1882 one Enoch Pratt by letter proposed to the Mayor and City Council of Baltimore that he would erect on his own property a central library building to cost about \$225,000 and *deed the same to the City, with the City to have title to all the books and property*, and further that he would pay over to the City the sum of \$833,333.33 "provided the City will grant and create an annuity of fifty thousand dollars (\$50,000) per annum forever, payable quarterly to the Board of Trustees, for the support and maintenance of the Library and its branches."<sup>1</sup> He further proposed that a board of nine trustees be incorporated for the management of the library, "the Board to be selected by myself from our best citizens, and all vacancies which shall occur, shall be filled by the Board. \* \* \* The trustees are to receive from the City the quarterly payments and to expend it at their discretion for the purposes of the Library." The letter further provided:

"This plan is suggested not without due consideration of the power of the City to carry it out. The City is expressly authorized by its charter to accept trusts for any general corporation purpose, or for the general purposes of education; and although its power of

<sup>1</sup> The annuity of \$50,000.00 payable by the City represented a six per cent yield on the fund of \$833,333.33; in exact figures \$49,999.98.

creating debts is limited by the Constitution of the State, yet *as the property of the library is to belong to the City, and as it will receive a sum of money to be disposed of as it pleases, with the engagement only to pay an annual sum for the support of its own Institution*, it is believed that such a transaction will not involve the creation of a debt within the meaning of the constitutional prohibition." (Italics ours) (R. 204-206).

The Maryland legislature March 30, 1882 passed a special enabling Act (Acts 1882, c. 181) which after reciting in the preamble that "the plan thus proposed offers the means of perpetually promoting and diffusing knowledge and education among the people of the City of Baltimore," empowered the City to accept the Pratt gifts and to agree by ordinance to pay to the trustees of the Library perpetually the annuity of \$50,000.00 (Secs. 1 and 5), and incorporated the Library, with nine persons theretofore named by Mr. Pratt as trustees with powers of self-perpetuation, to receive the annuity and expend it for the purposes of the Library in such manner as they deemed proper, and "to make all necessary by-laws and regulations for the government and administration of said trust, and for the appointment of the necessary officers and agents." (Sec. 2). The Act further ordered the City to appoint a visitor to make an annual examination of and report on the affairs of the Library, and authorized the City to resort to the courts, if necessary, to compel the trustees properly to perform their trust. (Sec. 3) (R. 191-3; 207-210).

Pursuant to the legislative authority above granted the City passed Ordinance No. 106, July 15, 1882 "for the purpose of perpetually promoting and diffusing knowledge and education among the people of the City of Baltimore," and agreed to accept the Pratt gifts and create a perpet-

ual annuity of \$50,000.00 to be paid to the trustees "to be applied by them to the purposes and maintenance of said library as established and defined in the Act of Incorporation thereof." (R. 193-196).

By Ordinance 64, May 14, 1883, the City directed the \$833,333.33 when paid over by Mr. Pratt to be invested in Baltimore sinking fund, and the interest and interest on interest to be reinvested until the total annual interest should equal \$50,000.00, at which time no further investment should be made and all taxation for raising the annuity should cease. Pending this, the ordinance authorized the City to raise the annuity by taxation (R. 50). The Ordinance was approved at a special city election held the fourth Wednesday in October 1882 (R. 213).

Mr. Pratt and wife conveyed the real estate to the City by deed July 2, 1883, which recited the completion of the Library building and payment of the \$833,333.33 to the City, and set out the terms of agreement as to the annuity and management of the Library (R. 211-217).

By Ordinance 145, October 10, 1884, the Mayor was authorized to appoint a visitor to the Library as provided in Acts 1882, c. 181 (R. 196).

#### THE CARNEGIE GIFT

In 1907 Andrew Carnegie gave the City \$500,000.00 for construction of branch libraries on sites to be provided by the City, on condition the City issue an annual tax levy not less than 10 per cent of the gift for maintenance of said branches. By Ordinance 275, May 11, 1907, the City accepted said gift and provided *it should be expended by the Pratt Library trustees*, and that upon completion of the branch library buildings the same should be maintained by an annual tax levy producing not less than 10 per cent of the Carnegie gift—*the annual appropriation to be ex-*

*pended by the Pratt Library trustees* for the branch libraries maintenance "in such manner as may be specified from year to year in the Ordinance of Estimates" (Italics ours). The Ordinance was expressly made subject to approval by the State Legislature (R. 196-197).

By Acts 1908, c. 144, the Maryland legislature impliedly ratified the gift by adding to the Baltimore City Charter Act 4, Sec. 6, a provision empowering the City to "appropriate and pay over such sum or sums, as it shall from time to time deem proper, for the equipment, maintenance or support of the Enoch Pratt Free Library of Baltimore City, or of any other free public library in Baltimore City, *provided, that the title or ownership of the property of every such library or branch is vested in the said Mayor and City Council of Baltimore.*" (Italics ours) (City Charter, Art. 4, Sec. 6-14a—R. 218). Thereafter Ordinance 275, May 11, 1907, was reenacted as Ordinance 249, April 23, 1920 (R. 199).

#### GROWTH OF THE LIBRARY SYSTEM

The central library outgrew its quarters, and by Acts 1927, c. 328, the Maryland legislature authorized Baltimore City to issue city bonds in the amount of three million dollars for acquisition of land by purchase or condemnation, erection and equipment of a free public library in Baltimore (R. 198). The City by Ordinance 1053, April 13, 1927 provided for said bond issue of three million dollars and redemption of the same in 35 yearly series, the first series amounting to \$86,000.00, for tax levy to meet the interest and principal due under the issue, for acquisition of a library site by purchase or condemnation for a free public library in Baltimore City, and further *provided that the Pratt Library trustees should approve the site before it should be acquired and should approve the plans and*

*specifications for the library building and endorse their approval on the same before final acceptance by the City* (R. 54). The Pratt Library trustees did approve both site and building plans and specifications for the new library building. The site, building and equipment were paid for out of the bond issue (R. 55).

By Ordinance 559, December 7, 1928 the City designated certain lots as the free public library site and directed the City Solicitor to acquire said lots by purchase, or by condemnation proceedings in the name of the Mayor and City Council of Baltimore (R. 58-59). Part of the ground had to be acquired thru condemnation (See *Johnson v. Mayor and City Council*, 158 Md. 93).

By Ordinance 1195, December 16, 1930, the City incorporated the land acquired thru the 1927 bond issue with the original lot conveyed by Mr. Pratt in 1883, *supra*, provided for razing the buildings on the several parcels and erecting a suitable building for a free public library, and then provided in Section 3:

“That when said building is completed, the Enoch Pratt Free Library of Baltimore City shall be installed therein for the purpose of *maintaining and conducting a free public library* for the purpose of promulgating, promoting and diffusing knowledge and education among the people of the City of Baltimore.” (R. 199-200).

After the building was completed and equipped the City turned over the same to the trustees, and since that time the trustees have operated it as the Enoch Pratt Free Library. The library system now consists of the central building built out of the 1927 bond issue and 26 branch libraries, all owned by the City but operated by the Pratt Library trustees (R. 55).

## FISCAL RELATIONSHIP BETWEEN LIBRARY TRUSTEES AND CITY

Down to about 10 years ago the City made blanket appropriations and turned over the same to the Library trustees to be expended for library purposes. Then with the large increases in city appropriations for library purposes, the City wanted closer accounting, and made an arrangement with the trustees whereby all disbursements from city appropriations to the Library should be made thru the City Bureau of Control and Accounts on vouchers submitted by the trustees (R. 120-122).

The trustees make all staff appointments and all purchases for the Library, which are certified to the Bureau for payment (R. 67-68, 115), but the *Library staff salary checks are issued from the City payroll office, signed by the Mayor and City Council and payroll officer, and charged against the Library appropriation (R. 65).* Library employees are not under the City Merit System, but the Library trustees make their staff salaries conform to the city salary scale (R. 63, 113) and *if the trustees want to increase any salary above the city scale they have to take the matter up with the Board of Estimate (R. 113-114).* Further in establishing new positions the trustees have to persuade the Board of Estimates to provide funds for same (R. 114, 123).

The trustees now submit an *itemized budget* to the City which is reviewed by the City Committee to review budget requests. This Committee, which consists of the Mayor and the head of the Bureau of Control and Accounts, reviews the proposed budget, *eliminates or changes the line items as it feels justified;* then submits the revised budget to the Board of Estimates with recommendations. *The Library budget is included in the regular city budget (R. 108, 122-123).*

The trustees turn all book fines collected over to the city treasury; title to all books and other items purchased from

special gift funds is placed in the city. The city owns all library property and equipment, and disburses all monies of the Library, except special gift funds which are disbursed by the trustees with title passing to the City on all purchases made from such funds. The annual income from these gift funds recently has averaged about six or eight thousand dollars, or roughly about one per cent of the annual City appropriation (R. 56-66).

The \$50,000.00 Pratt annuity derived from interest on the City sinking fund is not included in the city appropriation (R. 63, 112). The interest and amortization of the three million dollar bond issue are not charged against the Library appropriation, but are paid otherwise by the City (R. 61).

By Acts 1939, C-16, the Maryland legislature authorized the City to *include the Library employees within the City Municipal Employees Retirement System* (R. 200-201). By Ordinance 961, May 29, 1939, the City provided that if the Library trustees requested, the City would put the Library employees under the City Retirement System (R. 202-204). The trustees so requested and the Library employees are now under the City Retirement System (R. 149). The contribution of the City for the Library employees to the Retirement Fund is about \$40,000.00 annually—which is not charged against the Library appropriation but paid otherwise by the City (R. 131).

The City appropriation, 1943, for the Library was \$511,575.00, not including the Pratt annuity, interest and amortization on the bond issue, and contribution to the Retirement Fund (R. 62).

The City appropriation, 1944, for the Library was \$650,086.90 which in this instance includes the Pratt annuity of \$50,000.00. But additional City appropriations of \$82,160.00 library bond interest, \$86,000.00 library bond retirement,



and \$40,000.00 City contribution for Library employees to the Retirement Fund bring the total 1944 City expenditures for the Pratt Library system to \$858,246.90 (R. 128-131). The trustees could not operate even the Central Library alone on the \$50,000.00 annuity provided under the Pratt donation (R. 58).

#### THE TRAINING CLASS

The Library staff consists of 285 full-time employees (R. 114), of whom about 140 or 150 are library assistants (R. 73), and about 80 junior library assistants (R. 95). There is a large turnover in staff each year; sometimes amounting to 20 per cent of the professional staff (R. 95).

Due to difficulties in finding replacements, the Library trustees in 1928 inaugurated a nine-months library training class for persons desiring employment on the Pratt Library Staff as junior library assistants. The course does not lead to a degree, and is primarily an intra-mural course designed to qualify junior library assistants for the Pratt Library system itself (R. 116). The Library is not under obligation to employ the training class graduates, but in fact *all competent persons who have graduated have been appointed to the staff as library assistants* (R. 72).

There has been a larger than usual turnover in staff since the war (R. 73). For the past two or three years the training class has been too small and has not furnished sufficient replacements (R. 88). There are more vacancies than graduates (R. 81, 107).

Due to the war emergency the normal 36 week training course has been telescoped into 26 weeks, and whereas student trainees had originally been paid \$40.00 a month after successfully completing the first three months' training, the Library trustees April 19, 1943, voted to pay trainees \$50.00 per month after the first two weeks' training,

on the ground that otherwise a sufficient number of trainees could not be recruited (R. 73-74, 106).

The salaries of the training class director and department head and the salaries of the student trainees are paid out of the general library appropriations by regular pay checks from the City pay roll office (R. 69-74). The training class is conducted on public property with public facilities at public expense.

To recruit the training class the Library circularizes the various white colleges in the eastern part of the United States and advertises in the Sun newspapers which have the largest circulation in Baltimore (R. 85-86).

In the 16 years of the training class existence probably 200 or 300 Negroes have applied for admission (R. 145) but Negroes are not admitted to the class (R. 76).

#### LIBRARY ATTITUDE TOWARD EMPLOYMENT AND TRAINING OF NEGROES AS LIBRARY ASSISTANTS

Down to 1942 the Library had never employed a Negro as library assistant. By resolution June 14, 1933, the trustees voted not to employ Negroes as library assistants anywhere in the library system (R. 94).

On September 17, 1942, the trustees formally voted not to admit Negroes to the training class:

“Resolved that it is unnecessary and unpracticable to admit colored persons to the Training Class of The Enoch Pratt Free Library. The Trustees being advised that there are colored persons, now available with adequate training for library employment have given the librarian authority to employ such personnel where vacancies occur in a branch or branches with an established record of preponderant colored use.” (R. 101-102.)

Under this resolution two competitive examinations have been held among Negroes exclusively for appointment to

two library assistantships at Branch No. 1 (Pitcher Street Branch) which has nearly 100 per cent Negro patronage (R. 103-105). These examinations were held in Baltimore, but at least two applicants took the examination in Virginia and in North Carolina (R. 83-85).

January 21, 1943, the trustees ordered the Librarian not to make any commitments to Negroes beyond a second Negro library assistant at Branch No. 1 (R. 105). Of the 80 junior library assistantships on the Pratt Library Staff, Negroes are eligible only for the two positions at Branch No. 1; whites are eligible for all 80 positions (R. 84, 105-6).

At Branch No. 1 the Negro library assistant serves both white and colored patrons; but a Negro assistant could not even serve colored patrons at the Central Library. The established policy of the Library trustees is to appoint Negro assistants at Branch No. 1 only (R. 93), and there are no vacancies at that Branch (R. 164).

There is no segregation of patrons in the main library or in any branch library building (R. 100). Negro children constitute three-fourths of the readers in the Children's Room in the main building but no Negro assistant is eligible for work in the main building (R. 167).

The trustees consider the other members of the staff in making appointments and feel most other staff members do not want to work with Negro librarians (R. 179). The Library trustees select the library assistants as to race on the basis of what is the predominating color or race of the patrons going into a particular library or branch. They base this on their understanding of the customs of Baltimore (R. 173-174, 178, 181, 185).

Respondent Louise Kerr, a colored girl, duly applied for admission to the 1943 training class. Her qualifications were conceded (R. 24, 222). She was denied admission because there was no vacancy immediate or prospec-

tive which a Negro would be eligible to fill, and because her admission to the class "could result only in an unhappy and unprofitable waste of her time" (R. 164), and an unjustified expense to the Library (R. 174).

The Library April 15, 1943, in written reply to a specific question "Will qualified colored persons be permitted to take the future library training courses?", categorically answered: "No" (R. 110).

Respondent Louise Kerr sued the Library corporation, the individual Library trustees and the Librarian under the equal protection clause of the XIV Amendment and the Federal Civil Rights Act, 8 U. S. C. secs. 41 and 43, for an injunction against rejecting her application and excluding her from the training class solely because of race or color, a declaratory judgment, and damages against the individual trustees (R. 1-8). Her father, a Baltimore City taxpayer, joined in the action, seeking a declaratory judgment and an injunction against the Mayor and City Council of Baltimore (the municipal corporation constituting the City) under the due process clause of the XIV Amendment, to restrain the appropriations of City funds raised by tax levy for library purposes under the management of the Pratt Library trustees, beyond the contracted amount totalling \$100,000.00 annually under the Pratt and Carnegie donations, if the Court should determine the Library is a private corporation not subject to constitutional restraints in barring his daughter from the training class solely because of her race or color (R. 8-9).

#### FINDINGS AND RULINGS OF THE COURTS

##### *The District Court*

The District Court found that the training course was conducted purely as a function of the internal management of the Library for instruction of prospective em-

ployees; that the refusal to admit respondent Louise Kerr was not based solely on race or color but in good faith because no position would have been open to her on graduation; that the policy and practice of the trustees in selecting white persons only for the technical staff<sup>2</sup> (with the exception of the two Negro library assistants at Branch No. 1) was not due to personal prejudice or discrimination because of race or color, but due to their best judgment in selection of employees in the interest of the public service to be rendered, and the fact that the largely predominant patronage of the main and branch libraries, except Branch No. 1, is white. The Court held that the Library in selection and appointment of personnel, and its internal management, was acting as a private corporation, was not subject to constitutional restraints; that the Library appropriations by the City were not *ultra vires*, and dismissed the complaint (R. 22-23).

#### THE CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

On appeal, the Circuit Court of Appeals held that respondent had been excluded from the training class solely because of her race or color; that there is no other training school for librarians in the State supported by public funds (149 F. 2d at p. 215; R. 222); that the Library is a public institution owned and supported by the City; that the existence and maintenance of the central library and its twenty-six branches as now conducted are completely dependent upon the City's voluntary appropriations (149 F. 2d at p. 217; R. 229-230); that the maintenance of a free public library is a governmental function (149 F. 2d at p. 217; R. 230); that in creating the institution the state had vested the power of ownership in one instrumentality and

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<sup>2</sup> See colloquy of court and counsel (R. 91-92).

the power of management in another (the library board of trustees) (149 F. 2d at p. 218; R. 231); that the Library board is a representative of the State in the sense that it is bound by constitutional restraints, and its action in excluding respondent from the training course because of her color was state action within the meaning of the XIV Amendment. The appellate court therefore reversed the judgment and remanded the cause for further proceedings (149 F. 2d at p. 219; R. 233-234).

Its decision in the case of respondent Louise Kerr made the contentions of T. Henderson Kerr unimportant, and it did not discuss the same.

### **Summary of Argument**

#### **I**

The Library corporation and the Library trustees refused to receive respondent Louise Kerr's application and to admit her to the training class solely because of her race or color.

#### **II**

In refusing to receive respondent's application and in excluding her from the training class solely because of her race or color, the Library and Library trustees were acting as representatives of the State and their action violated the equal rights provision of the XIV Amendment and the Federal Civil Rights law.

## ARGUMENT

### I

**The Library corporation and the Library trustees refused to receive respondent Louise Kerr's application and to admit her to the training class solely because of her race or color.**

The record speaks for itself. The Library and its trustees admit in their supporting brief in this court that respondent's application for the training class was rejected because there were no vacancies in the two library assistantships (out of 80) which they had determined Negroes to be limited to because of race (Petitioners' Brief, p. 34).

There is no conflict in the testimony on this point. Every person from the Library organization who testified (Dr. Wheeler, Dr. Cullen, Mr. Hutzler, Mr. Williams) repeated the same story: (1) that the race of the library assistant is determined by the race of the preponderant number of patrons using the particular library or branch; (2) that the Library and trustees will appoint a Negro library assistant only where a branch has "an established record of preponderant colored use" (R. 101-102); (3) that the only place in the library system where a Negro Library assistant is eligible for appointment is Branch No. 1 (2 places), and that all other library assistantships are reserved for whites (78 out of 80 junior assistantships—the grade to which training class graduates are appointed); (4) that there is a surplus of trained Negroes available for the two assistantships at Branch No. 1; (5) that admission of the respondent to the training class "could result only in an unhappy and unprofitable waste of her time" (R. 164), and an unjustifiable expense to the Library (R. 174); and (6)

that qualified Negroes will not be admitted to the training class in the future (R. 110).

The Circuit Court of Appeals was not misled by the simulated solicitude of the trustees that this respondent not be permitted to waste her time. Obviously the trustees were not going to be naive enough to expose their whole case by confessing race discrimination. But the fact remains as stated by the Circuit Court of Appeals:

“But it is nevertheless true that the applicant’s race was the only ground for the action upon her application. She was refused consideration because the Training School is closed to Negroes, and it is closed to Negroes because in the judgment of the Board, their race unfits them to serve in predominantly white neighborhoods” (149 F. 2d at p. 214; R. 224).

Things equal to the same thing are equal to each other.

## II

**In refusing to receive respondent’s application and in excluding her from the training class, solely because of her race or color, the Library and Library trustees were acting as representatives of the State, and their action violated the equal rights provision of the XIV Amendment and the Federal Civil Rights Law.**

The original act of incorporation of the Pratt Library created a corporation for the sole purpose of performing a delegated governmental function with public property, public facilities and public money. It provided public ownership eliminating any propriety or vested interest in the trustees; private management eliminating the hazards of city politics in the administration of the library service.

Acts 1882, c. 181 (R. 191).



There can be no question at this date that the maintenance of a free public library is a governmental function in Maryland.

Md. Anno. Code (Flack, 1939), Art. 77, sec. 163.

Baltimore City Charter, art. 4, sec. 6-14A (R. 51).

Acts 1927, c. 328 (R. 198).

*Johnson v. City of Baltimore*, 158 Md. 93 (1930).

The state may perform its governmental function of advancing education (a) directly, through its own agencies.

Md. Anno. Code, Art. 77, *supra*.

(b) indirectly, through grants-in-aid to established independent institutions,

Acts 1943, c. 710 (Md. Appropriations Act, items 88-96),

(c) or by creating a corporation such as the Pratt Library corporation, for the particular purpose, to administer public property and public funds.

Acts 1882, c. 181, *supra* (R. 191).

The fact that the state chooses to act thru the corporate form rather than a traditional governmental department is immaterial.

*McCulloh v. Maryland*, 4 Wheat. (17 U. S.) 316 (1819).

*Clallam County v. United States*, 263 U. S. 341 (1923).

*Pittman v. H. O. L. C.*, 308 U. S. 21 (1939).

It may be conceded that under the Maryland decisions the fact the Pratt Library corporation has a self-perpetuating board of trustees would classify it in Maryland as a private, distinguished from a public, corporation. But private persons and associations exercising governmental functions with powers conferred on them by statute are subject to constitutional restraints.

*Nixon v. Condon*, 286 U. S. 73 (1932).

*Smith v. Allwright*, 321 U. S. 649 (1944).

*Steele v. L. & N. R. Co.*, 323 U. S. 192 (1944).

The test whether an instrumentality is subject to constitutional restraints is functional and does not depend upon organizational structure.

*Steele v. L. & N. R. Co., supra.*

“The test is not whether the members of the Executive Committee are the representatives of the state in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.” *Nixon v. Condon, supra*, at p. 89.

As noted above, the Pratt Library corporation was created for the purpose of exercising governmental functions, and for no other purpose:

A. It owns no property of any kind (books purchased through private gifts are turned over to the City).

B. It administers public property and public funds in the performance of a public service.

C. It has the power of subordinate legislation affecting the use of public property, public facilities and public funds.

D. It enjoys sovereign exemption from all state and local taxation.

E. Its actual fiscal operations employ for all purposes the fiscal machinery of Baltimore City.

F. Its maintenance is 100 per cent from public funds. (Income from private gifts is used for special collection purchases.)

G. It performs the governmental function of advancing education.

The authority of the Library corporation and the Library board of trustees stems directly from the state.

“The pith of the matter is simply this, that when these agencies are invested with an authority inde-

pendent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power." *Nixon v. Condon, supra*, at p. 88.

A brief review of the successive extension of powers and functions delegated to the Library corporation and Library trustees by the State and City will show how intimately the Library and trustees have been assimilated into the government structure, and how complete has been the delegation to them of governmental powers and functions over the free public library service to the people of Baltimore.

1882: Act of incorporation for purpose of administering public property, public facilities and public money for library purposes, with power to make by-laws and regulations governing same, and hiring of staff. (Acts 1882, c. 181; Ord. 106, July 18, 1882.)

1907: trustees to accept the sites on which the Carnegie branch library buildings to be built—sites owned by the City; Carnegie gift to be expended by the trustees; annual appropriation for branches to be built out of Carnegie gift to be expended by the trustees. (Ord. 275, May 11, 1907.)

1908: City given express legislative authority to appropriate public money to Enoch Pratt Free Library of Baltimore City, by name. (Acts 1908, c. 144.)

1927: trustees to approve library site to be acquired by the City out of City bond issue, before final approval; trustees to approve plans and specifications for the new library building to be erected by the City out of the bond issue, and to endorse acceptance on the plans before final acceptance of same by the City. (Ord. 1053, Apr. 13, 1927.)

1930: Enoch Pratt Free Library to be installed in new library building built by the City "for the purpose of maintaining and conducting and operating a free

public library for the purpose of promulgating, promoting and diffusing knowledge and education among the people of the City of Baltimore." (Ord. 1195, December 16, 1930.)

1934: (Date uncertain—see Testimony of Fallon, head of City Bureau of Control and Accounts, R. 120-122) City fiscal machinery put at service of trustees in auditing and making all disbursements under city appropriations.

1939: Library employees placed under municipal employees Retirement System, with City making contribution to Retirement Fund for the Library employees. (Acts 1939, c. 16; Ord. 961, May 29, 1939.)

1944: Total City appropriations, plus Pratt annuity, for Library purposes under control of trustees, \$858,-246.90.

Even the original donor, Mr. Pratt, conceived of and characterized the Library as the City's *own institution*, referring to the fact title to the building and funds was to be vested in the City (Letter, January 21, 1882, R. 204-206).

It needs no citation to establish that the City could not use public property or expend public funds to the profit and advantage of the white population to the exclusion of the Negro. Here a white girl can train to be a library assistant while living at her home in Baltimore and be paid a substantial stipend of \$50.00 while in training; whereas an equally qualified Negro Baltimore girl must leave her home, go outside the state at her own expense to take library training and stand a competitive examination with persons both resident and non-resident for the only 2 positions out of 80 on the library staff which the trustees have opened to Negroes.

We are not here dealing with segregation or separate facilities, but with exclusion. There is only one Library

training class in existence, and no other library training course within the state.

Appointment to public office cannot be made more onerous for Negroes than for whites.

*Alston v. School Board*, 112 F. 2d 992, 130 A. L. R. 1506 (1940).

*People v. Crane*, 214 N. Y. 154, 167-168 (1915).

Neither can the City or State by delegation of legislative power accomplish indirectly what it cannot do directly.

*Nixon v. Condon*, *supra*.

*Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

This then is not *Snowden v. Hughes*, 321 U. S. 1 (1944) relied on so heavily by petitioners. There the Canvassing Board was acting in violation of the state statute. Here the trustees are acting under color of and pursuant to authority delegated them by a state statute. They represent the highest functioning authority in the premises within the state jurisdiction. Their resolution of September 17, 1942 (R. 101-102) is *legislation* itself, having the force of law by authority delegated them by the Maryland legislature (Acts 1882, c. 181 *supra*). *Pro tanto*, as far as this respondent is concerned they are, in their corporate capacity, the *state*.

Maryland recognizes that a delegation of governmental power must be hedged about with safeguards against arbitrary action.

*Baltimore v. Radecke & Co.*, 49 Md. 217 (1878).

In this case it is true that nowhere in the state acts or city ordinances are the constitutional restraints spelled out in the text; but this is not necessary. The Federal

Constitution is the supreme law of the land, and as such as much a part of every statute and ordinance as if expressly repeated therein. Under the principle that a statute or ordinance will not be construed as unconstitutional unless unavoidable, the constitutional restraints are implied.

*Steele v. L. & N. R. Co., supra.*

The action of the Library trustees and the Library, pursuant to the policy established by the resolution *supra* in refusing to receive respondent's application and admit her to the training class solely because of race, falls directly within the precedents of this Court and of the court of last resort of Maryland.

*Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938).  
*Pearson v. Murray*, 169 Md. 478, 103 A. L. R. 706 (1936).

The trustees rely on the customs of Baltimore (R. 173-174, 178, 181, 185), which squarely puts their action within the prohibitions of the Federal Civil Rights Law (8 U. S. C. A. sec. 41) and makes them individually liable to respondent (8 U. S. C. A., sec. 43).

See *Lane v. Wilson*, 307 U. S. 268 (1939).

*Bluford v. Canada*, 32 F. Supp. 707 (1940).

The District Court ruled that "in the selection and appointment of its employees, and its internal management" the Library acts "as a private corporation and not as a governmental agency" (R. 23). This is strange doctrine. Until this particular ruling the books had always held "internal affairs" of a corporation to refer to rights, claims and duties between a corporation and its members, or between members and members, as distinguished from

rights, claims and duties between the corporation and outsiders.

*Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (n.s.) 551, 111 Am. St. Rep. 637 (1906).

Respondent is not a member of the Pratt Library Corporation; her rights are affected as a citizen. If the Pratt Library corporation were hiring people out of its own corporate treasury to deal with its own property, conceivably the matter of hiring might relate to the internal affairs of the corporation. But here hiring is out of the Baltimore City treasury, and the jobs consist of handling public facilities and public property in the public service in the performance of a governmental function. And no member of the corporation is involved, as the corporation has no membership beyond the nine members of its board of trustees. No person on the payroll, no person in the training class is a member of the corporation; they all come from outside.

There is not a single internal action which the corporation or its trustees can take which does not instantly affect public rights either in the use of public property or expenditure of public funds, except possibly the filling of a vacancy on the board of trustees itself. The trustees draw no stipend, hence in their action as members of the board the public treasury is not immediately involved. They may hold their meetings off Library property; hence the use of public property is not necessarily involved in their board meetings. But every contract they make whether for the acquisition of supplies or personnel is a matter of public concern and involves the public treasury. The ruling of the District Court must seek its support in sources other than logic and precedent. The sources are prejudice and conservatism.

**Conclusion**

It is respectfully submitted that the decision of the Circuit Court of Appeals is so clearly right that no reason exists for issuance of a writ of certiorari.

Respectfully submitted,

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